BRIEF IN SUPPORT OF PETITION.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. pp. 61-64) was rendered on March 23, 1945. The opinions of the District Court were rendered by the District Court for the Southern District of New York on December 21, 1943 and February 12, 1944. Judgment was rendered by said District Court (R. pp. 56, 57) on February 25, 1944, and by the aforesaid Circuit Court (R. p. 65) on April 9, 1945.

Jurisdiction.

1. The date of the judgment to be reviewed is April 9, 1945; the petition for writ of certiorari is being presented before July 9, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240, Title 28 U. S. C. A. Section 347, and Rule 38, subdivision (5) of the Rules of the Supreme Court.

3. The nature of the within case and the rulings of the Circuit Court are such as to bring the case within said jurisdictional provisions.

The case involves an important question of federal law which has not been and should be settled by the Supreme Court. The action was brought for the refund of floor stocks taxes paid under the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) (R. p. 2). A claim for refund of said taxes, which had been filed with the

Commissioner of Internal Revenue under Title VII of the Revenue Act of 1936 (49 Stat. 1648) and Regulations 96 (R. p. 15) was rejected by him (R. p. 25). The Circuit Court affirmed the judgment of the District Court dismissing plaintiff's complaint on the basis of *Samara* v. *U. S.*, 129 F. (2) 594, and held that there was no error in said dismissal, since plaintiff had failed to present sufficient evidence to the Commissioner in support of its claim for refund; that under the authority of the *Samara* case, the evidence submitted to the Commissioner must be sufficient to prove the cause of action alleged in the suit (R. p. 63).

Said ruling of the Circuit Court is in direct conflict with a decision of the Circuit Court of Appeals for the Third Circuit and with decisions of Federal Courts in the Third, Fourth, Fifth, Sixth and Ninth Circuits. Said decisions are listed in paragraph "4", *infra.*

4. The cases believed to sustain said jurisdiction are as follows:

Bethlehem Baking Co. v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1942);
Hutzler Bros. v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940);
Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1942);
Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);
Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D. Texas 1940);
Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 742 (E. D. Pa. 1942);
Snead, Collector v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1932) (26 U. S. C. A. 156; Reg. 45, Art. 1036);

Paul Jones & Co. v. *Lucas,* 33 F. (2d) 907 (D. C. Ky. 1929), affirmed 64 F. (2d) 1016 (C. C. A. 6th, 1933) (Revenue Act of 1926, Sec. 1113(a); Reg. 69, Art. 1304);

Fidelity & Columbia Trust Co. v. *Lucas,* 7 F. (2d) 146 D. C. Ky. 1925).

5. The questions here involved are substantial for the reason that many hundreds of cases for the refund of taxes paid under the Agricultural Adjustment Act of 1933, involving millions of dollars, are now pending in the Federal Courts; the question as to the construction of the Revenue Act of 1936 and Regulations 96 concerning the necessity for submission of evidence to the Commissioner is involved in a great many of said cases.

The questions here involved are also substantial for the reason that the question as to the necessity of the submission of evidence to the Commissioner and as to the quantum of proof required to be submitted to him is involved in claims for refund of other types of taxes. (See *The Blum Folding Paper Box Company, Inc.* v. *Commissioner, supra*).

The question as to the jurisdiction of the District Court over the action is also important and substantial.

Statement of Case.

This has already been stated in the preceding petition in "Summary Statement of Matter Involved" (pp. 1-3) which is hereby adopted and made a part of this brief.

Specification of Errors.

The Circuit Court erred in holding that:

1. Sections 902 and 903 of the Revenue Act of 1936 and Regulations 96 require that evidence be submitted to the Commissioner in support of a claim for refund.

2. The rule in the *Samara* case was the correct rule to be followed in actions for refunds of taxes paid under said Act.

ARGUMENT.

Summary of Argument.

Certiorari should be granted for the reasons that:

POINT I.

The Circuit Court's decision is in direct conflict with decisions of the Third Circuit and District Courts in other circuits, on the question as to whether Sections 902 and 903 of the Revenue Act of 1936 and Regulations 96 require the submission of evidence to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933.

POINT II.

The Circuit Court's decision is in direct conflict with decisions of the Fifth and Sixth Circuits, involving similar statutes and regulations, on the question as to whether the submission of evidence to the Commissioner of Internal Revenue is required in support of a claim for refund.

POINT III.

An important and substantial question of Federal Law is involved which has not been and should be settled by the Supreme Court.

POINT I.

The Circuit Court's decision is in direct conflict with decisions of the Third Circuit and District Courts in other circuits, on the question as to whether Sections 902 and 903 of the Revenue Act of 1936 and Regulations 96 require the submission of evidence to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933.

In *Bethlehem Baking Co.* v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1942), the claimant submitted to the Commissioner, in support of its claim for refund filed with the Commissioner, an analysis of costs for the periods prior to and subsequent to the effective date of the tax and for the period during which the tax was in effect. Upon rejection of its claim for refund, the claimant commenced suit for the refund of the taxes in the District Court. Upon appeal from a judgment for the plaintiff, the Circuit Court thus stated the question involved:

> "The principal question in this case is whether the matter submitted by the plaintiff taxpayer to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933 complied sufficiently with the requirements of Title VII, Section 902, of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (providing for refund of such taxes), so as to preserve the plaintiff's standing to sue for the refund following the Commissioner's disallowance of the claim."

The Court in the cited case ruled that all evidence relied upon by the taxpayer did not have to be submitted to the Commisisoner. It held:

> "In Section 903 of the Revenue Act of 1936 there is the additional provision that 'All evidence relied upon in support of such claim shall be clearly set forth under oath' * * * *Was the requirement in Section 903 intended to impart finality to the decisions of the Commissioner* with respect to claims for refund by * * * *withdrawing jurisdiction from the courts in such regard because the Commissioner was not satisfied that all evidence relied upon in support of the claim had been clearly set forth under oath? We think not.* Section 903 appears to be in furtherance of the administration of Section 902. It indicates no legislative intent to give greater finality to the decisions of the administrative officer than did Section 902 * * * While it is the duty of a claimant to present a formal claim and to endeavor by sufficient proof to satisfy the Commissioner as to its merits, *he should not be barred from presenting further evidence in support of the same claim in a suit for refund after rejection by the Commissioner.* See *Hutzler Bros. Co.* v. *United States,* 33 F. Supp. 801, 803 (D. Md.) * * *
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> In the instant case, which was a suit for refund, the matter was for the satisfaction of the court on the basis of the relevant proofs adduced at trial (See Section 902)." (Italics ours.)

That a direct and irreconcilable conflict exists between the Circuit Court of Appeals for the Third Circuit and the Circuit Court of Appeals for the Second Circuit was acknowledged by the Circuit Court of Appeals for the Second Circuit in its opinion in the instant case. It said (R. p. 64):

> "We decline, with deference to subscribe to the reasoning and result in *Bethlehem Baking Co.* v. *U. S.,* 3 Cir., 129 F. (2) 490."

It is submitted that the existence of such a conflict is a sufficient basis for the granting of certiorari. It was so held by the Supreme Court of the United States in the case of *Commissioner* v. *The Scottish American Investment Company, Ltd.*, 323 U. S. 119 (1944). In that case, the question was whether the taxpayer maintained an office or place of business within the United States. The Tax Court had held that the taxpayer had a place of business in the United States. The Commissioner appealed from said decision to the Circuit Court of Appeals for the Third Circuit as to two of the taxable years, and to the Circuit Court of Appeals for the Fourth Circuit as to two other of the taxable years (returns having been filed in different Collector's offices). The Circuit Court of Appeals for the Third Circuit reversed the Tax Court's decision, while the Circuit Court of Appeals for the Fourth Circuit affirmed said decision. The Supreme Court granted certiorari, because, as it said, while the Fourth Circuit affirmed the Tax Court's decision "the Circuit Court of Appeals for the Third Circuit, considering the identical facts and substantially the same statutes and regulations, held that the taxpayers did not have an office or place of business within the United States during 1938 and 1939; the decision of the Tax Court as to those years was accordingly reversed (142 F., 2d, 401). *The irreconcilable conflict between the two Courts below led us to grant certiorari.*" (Italics ours.)

A comparison between the *Bethlehem Baking Co.* case and the instant case, as to their facts, and statute and regulations involved, discloses that identical statutes and regulations are involved and substantially similar facts. Their holdings being in direct conflict, under the authority of the cited case, certiorari should be granted here. The statute and regulations involved in the instant case and the *Bethlehem Baking Co.* case (Revenue

Act of 1936, Sections 902 and 903, and Regulations 96) are identical. The facts in each are substantially the same. In the instant case, petitioner had submitted to the Commissioner a schedule of gross sales, cost of sales and gross profits for the years 1927 through 1935 inclusive (periods similar to those submitted by the claimant in the *Bethlehem* case). In the *Bethlehem Baking Co.* case, claimant submitted an analysis of costs for said periods. Yet, considering identical statutes and regulations, and substantially similar facts, both Courts came to directly conflicting conclusions. The Circuit Court of Appeals for the Third Circuit held that the claimant "should not be barred from presenting further evidence in support of the same claim in a suit for refund after rejection by the Commissioner," while the Circuit Court of Appeals for the Second Circuit held that "evidence admissible at the trial was confined to that presented to the Commissioner" (R. p. 63). Such an irreconcilable conflict between said two Courts, it is submitted, requires the granting of certiorari under the authority of *Commissioner* v. *The Scottish American Investment Company, Ltd., supra.*

In *Hutzler Bros.* v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940) cited by the Circuit Court in the *Bethlehem* case, the government's contention was similar to that made in the instant case. It is thus stated by the Court:

> "It is contended that by this provision the plaintiff was required to set forth under oath all of the evidence upon which it relied as a condition precedent to the allowance of any claim for refund, and that no suit may be maintained in this Court by plaintiff unless it alleges,—as it did not do,—as an essential part of its right of action, that it had presented to the Commissioner all the available evidence bearing upon its right to refund * * * "

The Court held as to said contention:

> "• • • We find this position of the Government to be without merit. *Where a claim has been rejected by the Commissioner and such a fact is alleged in the complaint, no further allegation is necessary for the maintenance of a suit for refund; and in such suit a plaintiff is not limited to the same evidence produced before the Commissioner. The intent of the statute, reasonably interpreted from the language employed and above quoted, is to bar consideration of claims merely on informal statements or memoranda,* and to surround the presentation of claims with full verification, *but it is not intended that a claimant who produces before the Commissioner certain evidence is forever thereafter barred from introducing further evidence in resorting to a Court proceeding for refund—a right which is expressly given by Section 905 of the Act.*" (Italics ours.)

To the same effect as the two cited cases, see:

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1941);

Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);

Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D. Texas 1940);

Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 742 (E. D. Pa. 1942).

The Circuit Court in the instant case held that petitioner could not succeed in its appeal because of the effect of the *Samara* case, in which it was held by the same Court that the evidence admissible at the trial was confined to that presented to the Commissioner. This holding, it is submitted, is in direct conflict with the decisions above set forth.

POINT II.

The Circuit Court's decision is in direct conflict with decisions of the Fifth and Sixth Circuits, involving similar statutes and regulations, on the question as to whether the submission of evidence to the Commissioner of Internal Revenue is required in support of a claim for refund.

Petitioner's authority for reference to other statutes and regulations concerning other claims for refund is found in the Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2). The purpose of said statute is thus stated (pp. 699, 700):

> "The revision of the provisions of section 21 (d) contained in Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund, namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden. However, the procedure in the handling of these claims has been modified so as to diminish in so far as possible the administrative burden involved in passing on them. *The greater number of claims which may be filed relate to claims for compensation taxes and floor stock taxes. In these cases the issue of fact as to whether or not the claimant bore the economic burden of the tax will be relatively simple. The bill therefore proposes that such claims shall be handled in the same manner as any other claims for refund under existing law.* The claimant will merely present his claim to the Bureau of Internal Revenue, and it will be passed on without formal hearing. If the claimant is dissatisfied with the decision of the Commissioner, he will then have recourse to the district court or the Court of Claims." (Italics ours.)

The manner in which "any other claims for refund under existing law" was handled is illustrated in the following cases; petitioner's interpretation of Sections 902 and 903 of the Revenue Act of 1936, here involved, is supported by these cases which place a similar interpretation on similar statutes concerning "other claims for refund".

In *Paul Jones & Co.* v. *Lucas*, 33 F. (2d) 907 (D. C. Ky. 1929), affirmed 64 F. (2d) 1016, the Revenue Act of 1926 (Sec. 1113[a]) and Regulations 69 (Art. 1304) were involved. The Court held:

> "The provision contained in Article 1304 of Treasury Regulations 69, *supra*, to the effect that 'all facts relied upon in support of the claim should be clearly set forth in detail under oath' is a proper exercise of the power delegated to the Commissioner of Internal Revenue to make rules and regulations for the enforcement of the act in question * * *."
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> "Fairly construed, the language of the regulations just quoted *does not require all the evidence upon which a taxpayer relies to be presented to the Commissioner.* It simply requires the fact or reasons for the alleged illegality of the tax to be presented to the Commissioner, leaving the taxpayer entirely free, *if he fails to secure relief at the hands of the Commissioner, to adduce, in a suit in court, new and additional evidence in support of the fact or reasons relied upon to establish the illegality of the tax.*" (Italics ours.)

In *Snead, Collector* v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1932), the statute and regulations involved were 26 U. S. C. A. 156 and Reg. 45, Art. 1036. The Court stated:

> "The regulations then in force, No. 45, Art. 1036, require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath'. * * * *This does not mean that the claim for refund must have contained all the evidence or argument* that is offered in the suit, but it must have indicated not only the amount claimed but the substantial grounds on which illegality is asserted and the general facts supporting the grounds * * *."

In *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. (2d) 146 (D. C. Ky. 1925), the Court stated as follows:

> "* * * in suits to recover internal revenue taxes erroneousy or illegally assessed and collected, * * * Congress has not committed the final decision in these matters to the Commissioner of Internal Revenue, or to any other executive or ministerial officer. On the contrary, *jurisdiction to finally determine such matter is conferred upon the Judicial Dept.*, provided the taxpayer has first taken all the steps required by law to be taken before appealing to the court. * * *
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> "In view of these statutory provisions (Section 3226 of the Revised Statutes, among others) and the authorities referred to, *this court is satisfied that it has jurisdiction to try the question of the plaintiff's tax liability in this case de novo, without in any way being limited to the evidence heard by the Commissioner, and unprejudiced by any action he may have taken in the matter.* * * *" (Italics ours.)

Sections 902 and 903 of the Revenue Act of 1936 and Regulations 96 (See appendix) involved in the in-

stant case, are similar in their requirements to the statutes and regulations involved in *Paul Jones & Co.* v. *Lucas* and *Snead, Collector* v. *F. H. Elmore, supra.* It was the intent of Congress in enacting the Revenue Act of 1936, as set out in the Congressional Committee Report, *supra,* that claims for refund thereunder "shall be handled in the same manner as any other claims for refund under existing law". The above cited cases illustrate how "claims for refund under existing law" were handled. The Circuit Court's decision herein, it is submitted, defeats said intent of Congress, said decision being in direct conflict with the cited cases. Certiorari should be granted because of this direct conflict between the Second Circuit and the Fifth and Sixth Circuits.

POINT III.

An important and substantial question of Federal Law is involved which has not been and should be settled by the Supreme Court.

The question of the construction of Sections 902 and 903 of the Revenue Act of 1936 has not been settled by the Supreme Court. As shown above, the Circuit Courts in various circuits are in direct conflict as to its construction, said Courts differing widely on the questions as to whether the statute requires that any evidence be submitted to the Commissioner in support of a claim for refund, as to how much evidence must be submitted to him, and as to whether a claimant is barred, in an action for refund of said taxes, from submitting evidence to the trial court which had not been previously submitted to the Commissioner.

The Circuit Court in the instant case construed said statute as requiring that evidence be submitted to the

Commissioner, that enough evidence be submitted to him to prove the claim for refund, and that no additional evidence could be later presented to the trial court. Said construction of the statute was made by that Court, first, in the *Samara* case, upon which said Court relied in affirming the District Court's judgment against the petitioner in the instant case. As appears in Points I and II, *supra,* the Circuit Courts of the Third, Fifth and Sixth Circuits construction of said statute is directly contrary.

Petitioner contends that the aforesaid questions on statutory construction are important and substantial and should be settled by the Supreme Court. In support of its said contention, petitioner cites the case of *The Blum Paper Box Folding Co. Inc.* v. *Commissioner*, 4 TC No. 96 (promulgated February 19, 1945). In that case, the Tax Court held against the taxpayer on the basis of the *Samara* case. There, the Commissioner moved to dismiss taxpayer's proceeding, which was brought to review the Commissioner's disallowance of its application for relief under Section 722 of the Internal Revenue Code from excess profits taxes. The basis of the Commissioner's motion was that practically no facts to support the application for relief were submitted to the Commissioner, that "the petitioner will never be permitted to prove facts excepting those stated in the applications," and that therefore the proceedings should be dismissed. The Tax Court found that the statute applicable to applications for relief under Section 722 "add up to similarity" with the statute applicable to refunds of processing and other taxes (involved in the instant case). It dismissed the proceeding, relying on the *Samara* case, following the principle there established that the Court would not consider evidence which was offered to the Commissioner for the first time after he had disallowed the claim. The Court held:

> "It is clear here that the petitioner can never get relief in this Court in the present proceeding because it will never be able to prove facts sufficient to support its claim and, therefore, the proceeding should be dismissed at this time."

Thus, the novel doctrine and the newly laid down principle of the *Samara* case and the instant case, enunciated as to processing taxes, with which other Circuit Courts are not in accord, has been extended to cases involving other tax refunds. Further this principle could be extended to *any* claim for refund of *any* type of tax filed with the Commissioner. The procedural provisions of the Revenue Act of 1936 covering processing and floor stocks tax refunds are similar in language to almost all statutes which set forth the procedure for filing a claim for refund of any Federal taxes with the Commissioner. The *Samara* principle is being applied extensively by the Commissioner affecting practically all claimants of refunds. Petitioner contends however that said principle, with which the various Circuit Courts are in direct conflict, should not be sanctified as the controlling law until the Supreme Court rules thereon. Because of its application to cases involving other types of taxes, such as *The Blum Folding Paper Box Co. Inc.* v. *Commissioner, supra,* the principle and the questions involved have become very important and substantial, and should be settled by the Supreme Court. Denial of certiorari will put uncertainty and hardship on this taxpayer and others similarly situated, since the doctrine is novel and the general opinion of taxpayers and tax practitioners, before the *Samara* case, was to the contrary. The rule requires that evidence not submitted to the Commissioner before rejection of the claim, be excluded on the trial. This is a fundamental change in Federal trial practice and calls for direct review by the Supreme Court.

A further important question involved is that of jurisdiction. The Circuit Court in its opinon in the instant case cited three cases from the Fifth and Seventh Circuits (*Weiss* v. *United States,* 135 F. [2] 889; *Jaubert Bros. Inc.* v. *United States,* 141 F. [2] 206; and *New York Handkerchief Mfg. Co.* v. *United States,* 142 F. [2] 111) as being in accord with its holding in the *Samara* case. Those Courts held, however, that failure to submit evidence to the Commissioner deprives the District Court of jurisdiction of the action for refund. The Circuit Court for the Second Circuit in the *Samara* case held that submission of evidence to the Commissioner was not a condition precedent to the jurisdiction of the District Court, and overruled the District Court on its holding that the Court had no jurisdiction. So that the holdings, cited as in accord with the *Samara* case, are in reality, not in accord. The question is still in conflict as to the effect on the District Court's jurisdiction of the failure to submit evidence to the Commissioner. This question, it is submitted, is an important and substantial one and should be settled by the Supreme Court.

Also, there are many hundreds of cases for refund of Agricultural Adjustment Act taxes, such as the instant one, still pending in the Federal Courts. Recovery will be denied claimants in some circuits for the same reason that recovery was here denied, whereas, other claimants in similar factual situations, but in different circuits, will recover. If certiorari is here granted and the ultimate guiding rule in this type of case is announced by the Supreme Court, there will be uniformity of decision in the several circuits; thus, there will be no advantage afforded to some claimants solely by reason of their geographical location. Further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the Courts, counsel and litigants.

It is therefore respectfully submitted that this case is one calling for an exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter revewing and reversing said decision.

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